No. 06-989

In the Supreme Court of the United States

HALL STREET ASSOCIATES, L.L.C.,
PETITIONER,
v.
MATTEL, INC.,
RESPONDENT.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR UNITED STATES COUNCIL FOR INTERNATIONAL BUSINESS AS AMICUS CURIAE IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

Should parties to an arbitration agreement be permitted to consensually expand judicial review of arbitral awards beyond the specific grounds set out in the Federal Arbitration Act for setting aside and vacating an arbitral award where the Act makes no provision for such an extension?

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STATEMENT OF INTEREST

The United States Council for International Business (the "USCIB") submits this brief as amicus curiae in support of respondent, Mattel, Inc. (the "Respondent").[1]

Founded in 1945, the USCIB promotes free trade and represents U.S. business interests before international and intergovernmental entities. Among its many roles, the USCIB represents the central values, ideas, and common interests of U.S. international businesses before U.S. policymakers, and officials in the United Nations, the European Union, and other governments and organizations. As an affiliate, the USCIB represents the U.S. international business community in the International Chamber of Commerce ("ICC"), the world business organization created in 1919 to promote trade and investment, open markets, and the free flow of capital.

Because of the vital role that arbitration plays in international business, the USCIB also represents the interests of the U.S. business community in connection with the ICC's international arbitration functions. The International Court of Arbitration®, established in 1923, is the world's leading institution for international commercial arbitration. International arbitration practitioners appointed by the USCIB play key roles in ICC arbitration proceedings, on the ICC Commission on Arbitration, and other ICC arbitration bodies. U.S. parties are among the principal users of the International Court of Arbitration®. In addition, U.S. cities have been consistently among the top five most frequently selected cities as places of arbitration at the International Court of Arbitration®. Int'l Ct. of Arb. [ICA], *Place of Arbitration: Most Frequently Selected Cities (1998 – 2006)*, March 2007.

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[1] Letters of consent from Petitioner and Respondent have been submitted concurrently with this filing. No counsel for any party has authored this brief in whole or in part and no person or entity, other than amicus curiae, its members or its counsel, made any monetary contribution specifically for the preparation or submission of this brief. S. Ct. R. 37.6.

This case has broad implications for U.S. businesses that are frequent users of arbitration. The USCIB seeks to provide the Court with the perspective of the U.S. international business community as to why the position of Hall Street Associates, L.L.C., (the "Petitioner") should not prevail.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case constitutes a critical moment in the development of the jurisprudence of arbitration law in the United States. At stake is the long-held precept that arbitration awards are final and should be free from judicial interference. Finality of arbitration awards and freedom from judicial interference characterize the arbitration process and are central to the viability of arbitration as an alternative to litigation. Expanded judicial review of arbitral awards would vastly transform the landscape of arbitration and significantly undermine the viability of arbitration as a form of alternative dispute resolution.

This Court has previously refused to interpret the Federal Arbitration Act (the "FAA") in a manner that would "undermin[e] the FAA's proarbitration purposes" and "unnecessarily complicat[e] the law and breed[] litigation from a statute that seeks to avoid it." *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 123 (2001); *Allied-Bruce Terminix Companies, Inc. v. Dobson*, 513 U.S. 265, 275 (1995). Relitigation of disputes already submitted to the arbitral process, which is designed to avoid litigation, is precisely what the Petitioner seeks to do by asking this Court to sanction arbitration agreements where parties agree to finally resolve their dispute through a judicial, rather than an arbitral, process.

Despite the absence of any provision in the FAA permitting review for errors of law, Petitioner argues that the FAA nevertheless allows parties to contractually expand the court's statutory power of review. Petitioner advances two main points. First, Petitioner submits that the FAA does not prescribe the exclusive grounds for judicial review of an arbitral award. Second, Petitioner

contends that providing for expanded judicial review of arbitral decisions is not inimical to the policy underlying the FAA and arbitration generally.

Neither of Petitioner's submissions are supported by the FAA, its legislative history, nor case law interpreting it. Petitioner cannot be correct that parties can somehow consensually confer jurisdiction on the court to review arbitration awards in circumstances where the court has none. The circumstances surrounding the advent of the FAA support a narrow construction of the court's power of review. Tellingly, Congress modeled critical provisions of the FAA on the 1920 New York Arbitration Act—an act that embodied the principles of the reform movement and provided for limited judicial review—and rejected the approach under the 1917 Illinois Arbitration Statute—which provided for extensive judicial intervention on questions of law.

Arbitration is attractive to the international business community because it provides finality and certainty while also achieving other goals such as speed and efficiency. Arbitration enjoys the support of the courts because it advances a social good by providing a practical alternative form of dispute resolution while conserving scarce judicial resources. Permitting expanded judicial review of arbitral awards on issues of law and fact will sanction any number of exotic hybrid forms of dispute resolution that will provide few of the benefits of arbitration and many of the disadvantages of litigation. These mutations are inimical to the U.S. tradition of commercial arbitration, the hallmark of which has been limited judicial review. They are also inconsistent with the policies underlying the FAA, which was to secure recognition of arbitration as a meaningful alternative to judicial proceedings rather than merely a costly prelude to litigation.

ARGUMENT

I. EXPANDED JUDICIAL REVIEW IS CONTRARY TO THE ETHOS OF ARBITRATION

A. Finality Is An Indispensable Characteristic Of Arbitration

Expanded judicial review is antithetical to finality—an indispensable and irreducible characteristic of the arbitral process—and undermines arbitration as an efficient alternative means of resolving disputes. Many businesses—particularly those involved in international transactions—choose to resolve disputes through arbitration because it provides a more efficient alternative to litigation that yields a final result in the first instance and that is subject to judicial review only on very narrow grounds. Arbitration and litigation are very different modes of dispute resolution and one of the key distinctions is judicial review. As this Court has recognized, a party agreeing to arbitrate "trades the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration." *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985); *see also First Options of Chicago Inc., v. Kaplan*, 514 U.S. 938, 943 (1995) ("[A] party who has not agreed to arbitrate will normally have a right to a court's decision about the merits of its dispute . . . But, where the party has agreed to arbitrate, he or she, in effect, has relinquished much of that right's practical value."); *Wilko v. Swan*, 346 U.S. 427, 438 (1953) ("Congress has afforded participants in transactions subject to its legislative power an opportunity generally to secure prompt, economical and adequate solution of controversies through arbitration if the parties are *willing to accept less certainty of legally correct adjustment.*") (emphasis added) *overruled on other grounds by Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477 (1989).

But arbitration can achieve the goal of finality only if it results in an award that can be set aside for very limited reasons. Review of arbitral awards must therefore be

limited to the "bare essentials needed to afford due process and to protect the state's own interests." Hans Smit, *Contractual Modification of the Scope of Judicial Review of Arbitral Awards*, 8 Am. Rev. Int'l Arb. 147, 147 (1997).

B. Increased Judicial Review Deprives Parties Of Arbitration's Supposed Benefits And Prevents Arbitration From Being An Alternative Means Of Dispute Resolution

Arbitration cannot provide a meaningful alternative to litigation if the process concludes with the losing party searching for arguable errors of law to bring before the courts. Relitigation of matters that were supposed to be resolved in arbitration is wastefully duplicative and increases the time and cost of resolving disputes. Increased judicial review will also incentivize losing parties to challenge arbitral awards more frequently, and perhaps on more spurious grounds.

Parties can therefore only use arbitration as an efficient means of dispute resolution if arbitrators are the final arbiters of findings of both fact and law. *United Paperworkers Int'l Union v. Misco, Inc.*, 484 U.S. 29, 37-38 (1987) ("Because the parties have contracted to have disputes settled by an arbitrator chosen by them rather than by a judge, it is the arbitrator's view of the facts and of the meaning of the contract that they have agreed to accept. Courts thus do not sit to hear claims of factual or legal error by an arbitrator as an appellate court does in reviewing decisions of lower courts.").

Expanded judicial review also delays resolution of the parties' dispute. Instead of providing simple, informal, and expedited resolution, arbitration would be an expensive and time-consuming dress rehearsal for potentially lengthy, inefficient, and costly litigation. *Saxis Steamship Co. v. Multifacs Int'l Traders, Inc.*, 375 F.2d 577, 582 (2d Cir. 1967) ("[E]xtensive judicial review frustrates the basic purpose of arbitration, which is to dispose of disputes quickly and avoid the expense and delay of extended court proceedings."); Hans Smit, *Contractual Modification of the Scope of*

Judicial Review of Arbitral Awards, 8 Am. Rev. Int'l Arb. 147, 149 (1997) ("[I]f arbitral awards could be reviewed for errors of law or fact, arbitration would easily degenerate into a device for adding still another instance to the usual three instances of litigation in the ordinary courts."). Parties would then be trading litigation not for arbitration, but for arbitration that is very likely to be followed by *additional* substantive litigation. Neither process provides the quick and efficient resolution of disputes that arbitration standing alone would provide.

Contracting for expanded judicial review of arbitral awards will invariably introduce into arbitration the delays and costs traditionally associated with resolving disputes through litigation. Allowing the parties to create complicated procedural hybrids that cannot function without extensive judicial involvement is a perversion of the goals of arbitration. This Court has recognized that arbitration was established as "an alternative to the complications of litigation," and has specifically noted delay and expense as those characteristics of litigation that arbitration is intended to avoid. *Wilko*, 346 U.S. at 431. A draftsperson of the Uniform Arbitration Act recognized that "[i]f the parties can go to court on questions of law, then . . . you would have added just one more step to your ordinary trial procedure and you would defeat the whole purpose of this quick and relatively inexpensive proceeding." *Proceedings in Committee of the Whole of the Nat'l Conference of Comm'rs on Unif. State Laws* 1, 50H (1954) (statement of Mr. Davis).

Arbitration requires final and definitive resolution of disputes, free from the risk of protracted litigation. If arbitration is regularly followed by challenges to the arbitral award, the efficient resolution of disputes—a hallmark of arbitration—will disappear. Expanded judicial review of arbitration awards will significantly increase the cost of resolving disputes through arbitration and will necessarily deprive parties of a means of dispute resolution intended to be more expeditious and cost effective than litigation.

II. EXPANDED JUDICIAL REVIEW IS INCONSISTENT WITH THE LEGISLATIVE HISTORY OF THE FAA, THE PLAIN TEXT OF THE FAA, AND STATEMENTS BY THIS COURT

A. The Legislative History Of The FAA Reveals That Congress Intended To Preclude Judicial Review On Questions Of Law

The passage of the Federal Arbitration Act was the culmination of an arbitration reform movement intended to make agreements to arbitrate fully enforceable. The model for the FAA was the New York Arbitration Act of 1920 (the "New York Act"), which was considered the nation's first "modern" arbitration statute. Ian R. Macneil, *American Arbitration Law*, 34-37, 84-88 (1992) [hereinafter *American Arbitration Law*]. Indeed, the operative language of Section 2 of the FAA is virtually identical to Section 2 of the New York Act. *Id.* at 106. Since Section 2 of the FAA was lifted from Section 2 of the New York Act, "[a]ny starting point of historical analysis must, therefore, be the New York act."[2]

The language of Section 2 of the New York Act and the FAA, was a response to the common-law doctrine that agreements to arbitrate were revocable—and therefore unenforceable—up until the point an award was rendered. The language of the two statutes—providing that agreements to arbitrate are valid, irrevocable and enforceable—was a legislative reversal of this restrictive

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2 Section 2 of the New York Act stated:

> A provision in a written contract to settle by arbitration a controversy thereafter arising between the parties to the contract, or a submission hereafter entered into of an existing controversy to arbitration pursuant to title eight of chapter seventeen of the code of civil procedure, *shall be valid, enforceable and irrevocable, save upon such grounds as exist at law or in equity for the revocation of any contract.*

1920 N.Y. Laws, ch. 275, § 2 (emphasis added). This language is tracked in Section 2 of the FAA, which states that agreements to arbitrate "shall be valid, irrevocable, and enforceable save upon such ground as exist at law or in equity for the revocation of any contract."

common-law doctrine. *American Arbitration Law* at 106.[3] It was decidedly not intended to give license to the parties to contractually agree upon their own standards of judicial review.

Indeed, an important tenet of the reform movement was limited judicial review, a feature that was also reflected in the New York arbitration scheme and incorporated into the FAA. The other major competing state arbitration act of the era was the Illinois Arbitration Statute of 1917 (the "Illinois Statute"). In stark contrast with New York law, which provided for limited judicial review, the Illinois Statute provided for significant judicial intervention throughout the arbitral process on questions of law. *American Arbitration Law* at 34-35. Section 6 of the Illinois Statute provided that the arbitrators must, at the request of a party, "submit any question of law arising in the course of the reference for the opinion of the court" or reach conclusions of fact that were then submitted to the court for an opinion on "questions of law arising" that would bind the parties. *Id.* at 31-32.

Although the main focus of the reform movement was on reversing the doctrine of revocability, the reformers also viewed the enhanced judicial involvement of Section 6 of the Illinois Statute as a retrograde step:

> [S]ection 6, with its shifting of determination and application of law from the arbitrator to the courts, was also anathema to the reformers. True, less is to be found in the reform discussion of this issue than of revocability, but this reflects only a lesser need to raise the issue, not its lesser importance.

Id. at 33 (footnote omitted). Limited judicial review was an

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[3] The term "enforceability," was included in the "New York formula," and later picked up in Section 2 of the FAA, only as a "prelude to provisions for specific performance remedies ... in succeeding sections of the statute." *Note: Erie, Bernhardt, and Section 2 of the United States Arbitration Act: A Farrago of Rights, Remedies, and a Right to a Remedy*, 69 Yale L.J. 847, 854-55 (1960), *quoted in American Arbitration Law* at 106 n.27.

important element of the reform movement's formulation of arbitration as a distinctly different and non-judicial mode of dispute resolution. As it was the other major state arbitration statute, Congress was undoubtedly aware of the Illinois Statute's more interventionist approach. In declining to adopt the Illinois model , and instead enacting an act based on the reform model, Congress endorsed a view of arbitration that provided only for limited judicial review.

The concept that courts should only intervene in narrow circumstances is also reflected in the legislative reports during the passage of the FAA:

> If the parties to the arbitration are willing to proceed under it, they *need not resort to the courts at all*. . . [T]he party willing to perform his contract for arbitration is not subject to the delay and cost of litigation. Machinery is provided for the prompt determination of his claim for arbitration and the *arbitration proceeds without interference by the court.*

H.R. Rep. No. 68-96, at 2 (1924) (emphasis added).

Indeed, the view of arbitration Congress endorsed in the FAA has been a part of the federal courts' understanding of arbitration for over 150 years. Although the revocability doctrine may have impaired the practice of arbitration before the enactment of the modern state statutes and the FAA, the federal view of arbitration has historically been non-interventionist. In *Burchell v. Marsh*, 58 U.S. 344 (1854), Justice Grier expressed what was, in many ways, a "modern" theory of arbitration that the reformers of the 1920s would have recognized as consistent with their own conception of arbitration:

> Arbitrators are judges chosen by the parties to decide the matters submitted to them, finally and without appeal. As a mode of settling disputes, it should receive every encouragement from courts of equity. If the award is within the submission, and contains the honest decision of the arbitrators, after a full and fair hearing of the parties, a court of equity will not set it aside for

> error, either in law or fact. A contrary course would be a substitution of the judgment of the chancellor in place of the judges chosen by the parties, and would make an award the commencement, not the end, of litigation. In order, says Lord Thurlow, (Knox *v.* Symmonds, 1 Ves. Jr. 369,) "to induce the court to interfere, there must be something more than an error of judgment, such as corruption in the arbitrator, or gross mistake, either apparent on the face of the award, or to be made out by evidence; but in case of mistake, it must be made out to the satisfaction of the arbitrator, and that if it had not happened, he should have made a different award."
>
> Courts should be careful to avoid a wrong use of the word "mistake," and, by making it synonymous with mere error of judgment, assume to themselves an arbitrary power over awards. The same result would follow if the court should treat the arbitrators as guilty of corrupt partiality, merely because their award is not such an one as the chancellor would have given. We are all too prone, perhaps, to impute either weakness of intellect or corrupt motives to those who differ with us in opinion.

58 U.S. at 349-50. [4] In the main, therefore, it must be said that the American tradition of arbitration is inconsistent with expansive judicial review.

The FAA's emphasis on enforcing the parties' agreement to arbitrate does not, therefore, explicitly or

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[4] Later in the opinion, Justice Grier wrote that:

> The admission of witnesses to prove their estimate of the damages (even if it had been in the face of the objection of counsel, and not by consent) may have been an error in judgment, but it is no cause for setting aside the award; nor can the admission of illegal evidence, or taking the opinion of third persons, be alleged as a misbehavior in the arbitrators which will affect their award. If they have given their honest, incorrupt judgment on the subject-matters submitted to them, after a full and fair hearing of the parties, they are bound by it; and a court of chancery have no right to annul their award because it thinks it could have made a better.

Id. at 351-52.

implicitly endorse arbitration agreements providing for review for errors of law and was never intended to do so.

B. The Text Of The FAA Evinces Congressional Intent To Limit Judicial Review Of Arbitral Awards

The text of the FAA directs that, unless one of the enumerated exceptions applies, a court must confirm an arbitral award brought before it. Under Section 9 of the FAA, any party may apply for an order confirming an award, and the court must grant such an order unless one of the grounds in Sections 10 and 11 applies:

> If the parties in their agreement have agreed that a judgment of the court shall be entered upon the award made pursuant to the arbitration, and shall specify the court, then at any time within one year after the award is made any party to the arbitration may apply to the court so specified for an order confirming the award, and thereupon the court *must grant such an order unless the award is vacated, modified, or corrected as prescribed in sections 10 and 11 of this title* [9 USCS §§ 10, 11].

9 U.S.C. § 9 (emphasis added). Section 10 provides that the court may vacate an arbitral award:

> (1) where the award was procured by corruption, fraud or undue means;
>
> (2) where there was evident partiality or corruption in the arbitrators, or either of them;
>
> (3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or
>
> (4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

9 U.S.C. § 10 (a). Under Section 11, the court may modify or

correct the award only:

> (a) Where there was an evident material miscalculation of figures or an evident material mistake in the description of any person, thing, or property referred to in the award.
>
> (b) Where the arbitrators have awarded upon a matter not submitted to them, unless it is a matter not affecting the merits of the decision upon the matter submitted.
>
> (c) Where the award is imperfect in matter of form not affecting the merits of the controversy.
>
> The order may modify and correct the award, so as to effect the intent thereof and promote justice between the parties.

9 U.S.C. § 11. Read together, these sections require the court to confirm an arbitration award except in a limited number of circumstances, even if the award is a product of legal error. Lee Goldman, *Contractually Expanded Review of Arbitration Awards*, 8 Harv. Negot. L. Rev. 171, 180-81 (2003).

Notably, none of these sections—nor any other section in the FAA—permits parties to contractually alter the grounds on which the court may refuse to confirm an award under Section 9. The FAA regime unambiguously delineates a limited role for a reviewing court. *See, e.g., Florasynth, Inc. v. Pickholtz*, 750 F.2d 171, 176-77 (2d Cir. 1984) ("An examination of the underlying purpose of the arbitration mechanism amply demonstrates . . . [that] the confirmation of an arbitration award is a summary proceeding that merely makes what is already a final arbitration award a judgment of the court."). Moreover, this Court, and lower federal courts, have recognized that arbitration should generally be free from judicial oversight. *Eastern Associated Coal Corp. v. United Mine Workers of Am., District 17*, 531 U.S. 57, 62 (2000) (noting that "courts will set aside the arbitrator's interpretation of what [an] agreement means only in rare instances."); *see, e.g., Saxis Steamship Co.*, 375 F.2d at 581-82 ("We have made it quite

clear on earlier occasions that it is the function neither of this court nor of the district courts to review the record of the arbitration proceeding for errors of law or fact.").

The lead-in clause to Section 9 cannot, as Petitioner suggests, constitute congressional indication that confirmation of an award should be conditional on a judicial standard agreed to by the parties. Given that Congress had explicitly enumerated specific exceptions to the FAA's otherwise mandatory instruction to confirm arbitration awards, Congress would have provided for any supposed exception to the FAA's imperative to enforce awards explicitly. Instead, as discussed above, the legislative history indicates that Congress expressly intended the judicial confirmation of an arbitral award as a mandatory directive, which does not allow for private modification:

> The award must be in writing and acknowledged. Within one year after it is made, any party may apply to the court specified in the award, or to the Federal court in the district wherein the award was made, for judgment to be entered upon the award. This *must* be granted as a matter of course, unless the award is vacated, modified, or corrected. (Sec. 10.) The grounds for vacating, modifying, or correcting an award are limited. If the award was procured by corruption, fraud, or undue means, if there was evident partiality or corruption upon the part of an arbitrator, if the arbitrators were guilty of misconduct or misbehavior, if they exceeded their powers or failed to make a mutual final, or definite award, then and *then only* the award may be vacated.

Bills to Make Valid and Enforceable Written Provisions or Agreements for Arbitration of Disputes Arising Out of Contracts, Maritime Transactions, or Commerce Among the States or Territories or with Foreign Nations: Joint Hearings Before the Subcommittees of the Committees on the Judiciary, 68th Cong., 1st Sess. 34 (1924) (brief of Julius Henry Cohen, General Counsel of the New York Port

Authority and New York Chamber of Commerce, and drafter of the 1920 New York Act) (emphasis added). The text and legislative record of the FAA indicate that the grounds under which a federal court may review an arbitral award outlined in the FAA are exhaustive. Because the FAA does not contain an exception for party agreement, parties themselves cannot by agreement derogate from the explicit statutory mandate to confirm awards without reviewing the award for errors of law.

C. This Court Has Repeatedly Recognized That Judicial Review Of Arbitration Awards Is Extremely Narrow And Derives From The Grounds For Refusing To Confirm An Award In The FAA

Consistent with the roots of the FAA in the reform movement, this Court has repeatedly affirmed that the judicial review of arbitral awards under the FAA is extremely limited. *First Options of Chicago, Inc.*, 514 U.S. at 942-43 ("The party still can ask a court to review the arbitrator's decision, but the court will set that decision aside *only in very unusual* circumstances . . . the court should give considerable leeway to the arbitrator, setting aside his or her decision *only in certain narrow* circumstances.") (emphasis added); *Bernhardt v. Polygraphic Co. of Am.*, 350 U.S. 198, 203 (1956) ("judicial review of an award is more limited than judicial review of a trial. . . ."); *Wilko*, 346 U.S. at 436 ("Power to vacate an award is limited.").

This Court and the federal courts have not, as Petitioner argues, recognized additional, non-statutory grounds for judicial review of arbitral awards, but have rather further interpreted the existing statutory grounds for judicial review, by filling interstices in the FAA that have become apparent after its enactment. In *Wilko v. Swan*, this Court recognized that the grounds in Section 10 included manifest disregard of the law.

> Power to vacate an award is limited. While it may be true, as the Court of Appeals thought, that a failure

> of the arbitrators to decide in accordance with the provisions of the Securities Act would "constitute grounds for vacating the award pursuant to section 10 of the Federal Arbitration Act," that failure would need to be made clearly to appear. In unrestricted submissions . . . the interpretation of the law by the arbitrators in contrast to manifest disregard are not subject, in the federal courts, to judicial review for error in interpretation. The United States Arbitration Act contains no provision for judicial determination of legal issues such as is found in the English law.

346 U.S. at 436-37. This Court thereby clarified that the grounds for vacating an arbitral award under Section 10 of the FAA included those instances when the award reflected a manifest disregard of the law, but that an arbitrator's award is not otherwise reviewable for errors of law.

Additional grounds that are not expressly enumerated are nonetheless derived from the statutory list. *Raiford v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 903 F.2d 1410, 1412 (11th Cir. 1990) (discussing the "other grounds, derived from the statutory list," such as "manifest disregard of the law" and "arbitrary and capricious"); *Saxis Steamship Co.*, 375 F.2d at 581 (holding that when reviewing an arbitral decision, "the role of the court is limited to ascertaining whether there exists one of the specific grounds for the vacation of an award, provided in § 10 of the [FAA]").

Even where federal courts have discussed appropriate statute-derived grounds for vacating and modifying an arbitral award, they have nonetheless emphasized the presumption in favor of affirming an arbitral award. *French v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 784 F.2d 902, 906 (9th Cir. 1986) ("We review the Panel's award mindful that confirmation is required even in the face of "erroneous findings of fact or misinterpretations of law" . . . An arbitrator's decision must be upheld unless it is "completely irrational," or it constitutes a "manifest disregard of the law.") (citations and quotations omitted);

Hoffman v. Cargill, Inc., 236 F.3d 458, 461-62 (8th Cir. 2001) ("courts tread lightly in reviewing arbitration awards. "The courts' review of arbitration awards is extremely narrow" . . . These extra-statutory standards [of irrationality or manifest disregard for the law] are extremely narrow . . .") (quoting *Executive Life Ins. Co. v. Alexander Ins., Ltd.*, 999 F.2d 318, 320 (8th Cir. 1993)); *Bull HN Info. Sys., Inc. v. Hutson*, 229 F.3d 321, 330-31 (1st Cir. 2000) ("Beyond the specific grounds enumerated in § 10, courts 'retain a *very limited* power to review arbitration awards.'") (quoting *Advest, Inc. v. McCarthy*, 914 F.2d 6, 8 (1st Cir. 1990)) (emphasis added).

III. PRIVATELY DRIVEN JUDICIAL REVIEW OF ARBITRAL AWARDS WILL TAX ALREADY STRAINED JUDICIAL RESOURCES AND PROLIFERATE COSTLY LITIGATION

A. Privately Driven Judicial Review Of Arbitral Awards Would Decrease Judicial Efficiency And Place Undue Burdens Once Shouldered By The Arbitration System Onto The Federal Court System

While party autonomy is an important feature of arbitration practice, the virtually unlimited autonomy advocated by the Petitioner would transform arbitration into a hybrid form of dispute resolution that would undermine the principle of finality and tend to tax, rather than conserve, judicial resources.

Arbitration without enhanced judicial review provides parties with flexibility to tailor the dispute resolution process. Parties may specify issues to be resolved through arbitration and issues to be resolved in litigation. If they are particularly eager for courts to resolve an issue, they can provide for it. Parties may select from a variety of institutional rules to govern the proceedings, develop their own rules and procedures, or leave the rules to the arbitrators. They can decide whether rules of evidence should apply and select the substantive law governing the dispute. They have the freedom to determine the

arbitrators' qualifications and the manner in which they should be selected. In short, arbitration provides sufficient flexibility for parties to customize the process.

But party autonomy reaches its limit at the point that it transforms arbitration into another creature altogether. This Court should not issue an open invitation to parties and their lawyers to devise toothless hybrid regimes that would "render[] informal arbitration merely a prelude to a more cumbersome and time-consuming judicial review process." *Kyocera Corp. v Prudential-Bache T Servs.*, 341 F.3d 987, 998 (9th Cir. 2003), *cert. dismissed*, 540 U.S. 1098 (2004); *see also* Amy J. Schmitz, *Ending a Mud Bowl: Defining Arbitration's Finality Through Functional Analysis*, 37 Ga. L. Rev. 123, 181-82 (2002) (noting that arbitration procedures that leave significant issues for judicial resolution create "costly and time-consuming two-tiered proceedings that begin with private procedures but give way to public "do-overs." Expanded review agreements similarly create hybrid, two-step procedures that waste public and private resources. . ."); Hans Smit, *Contractual Modification of the Scope of Judicial Review of Arbitral Awards*, 8 Am. Rev. Int'l Arb. 147, 151 (allowing private expansion of judicial review of arbitral awards "would easily degenerate into a device for adding still another instance to the usual three instances of litigation in the ordinary courts").

Even where enhanced judicial review is an option, the hydraulic effect of the U.S. legal culture will be such that there will be a proliferation of expanded judicial review clauses that will significantly increase the costs of dispute resolution and embroil the courts in complicated issues on review. The courts will be forced to review a large number of arbitral awards in the abstract, often against the backdrop of unfamiliar rules and procedures which, by definition, deviate from the norms of federal practice. In many cases, the courts will have to reconstruct the arbitrator's findings of fact and legal reasoning made in proceedings that may have taken some time before.

A stark example of the burden placed upon a court by party-driven judicial review of arbitral awards is illustrated by *Kyocera Corp. v. Prudential-Bache T Services*, 341 F.3d 987 (9th Cir. 2003), where the district court was forced to review the case "thirteen years after the arbitration was initiated and three years after the Ninth Circuit directed the district court to apply expanded review." Amy J. Schmitz, *Ending a Mud Bowl: Defining Arbitration's Finality Through Functional Analysis*, 37 Ga. L. Rev. 123, 191-92 (citing *Lapine Tech. Corp. v Kyocera Corp.*, Nos. C-87-20316 WAI, C-91-20159 WAI, 2000 WL 765556, at *3-13 (N.D. Cal. Apr. 4, 2000) (showing the district court's painstaking rebuilding of the facts through a review of the arbitration panel's findings)). This is to say nothing of the increased time and cost in arbitration proceedings to document every submission and finding to anticipate and guard against the possibility of review.

B. This Court Has Not Allowed Parties To Dictate The Availability Or Standards Of Judicial Review, And Should Not Do So Here

This Court has generally rejected party-driven or privately-contracted attempts to confer jurisdiction on the courts to act in the absence of a statutory basis to do so. *See e.g., Ins. Corp. of Ireland, Ltd., v. Compagnie des Bauxites de Guinée*, 456 U.S. 694, 702 (1982) (stating that "no action of the parties can confer subject-matter jurisdiction upon a federal court"). The courts of appeals have followed this position by holding that "action by the court can be neither purchased nor parleyed by the parties," and that private stipulation that judicial review should occur "cannot bind the court." *Clarendon, Ltd., v. Nu-West Indus., Inc.*, 936 F.2d 127, 129 (3d Cir. 1991); *U.S. Aluminum Corp./Texas v. Alumax, Inc.*, 831 F.2d 878, 879-80 (9th Cir. 1987) (stating that federal courts are not bound by private parties' "stipulations as to the substance of law"), *cert. denied*, 488 U.S. 822 (1988); *Khouzam v. Ashcroft*, 361 F.3d 161, 167 (2d Cir. 2004) ("Action by [a] court is not a subject that the parties may negotiate among themselves, and a judicial act

... is normally taken only when the appellate court determines that such action is warranted on the merits.").

There is no reason why a different principle should apply here. As the Court of Appeals for the Seventh Circuit has held, "federal jurisdiction [over arbitral awards] cannot be created by contract." *Chicago Typographical Union No. 16 v. Chicago Sun-Times, Inc.*, 935 F.2d 1501, 1505 (7th Cir. 1991) (Posner, J.); *see also Hoeft v. MVL Group, Inc.*, 343 F.3d 57, 65-66 (2d Cir. 2003) ("[P]rivate parties may not dictate to a federal court when to enter a judgment enforcing an arbitration award. *Judicial standards of review*, like judicial precedents, *are not the property of private litigants . . . judicial review is not a creature of contract*, and the authority of a federal court to review an arbitration award . . . *does not derive from a private agreement.*") (emphasis added). This Court should not permit the Petitioner to confer jurisdiction on the courts to review arbitration awards where the FAA provides no basis for such jurisdiction.

IV. ALLOWING PARTIES TO CONTRACT FOR REVIEW FOR ERRORS OF LAW WILL INTRODUCE AN UNPRECEDENTED LEVEL OF REVIEW THAT WILL BE DIFFICULT TO COMPARTMENTALIZE AND IMPOSSIBLE TO LIMIT

Permitting parties to define the scope of judicial review will force the courts into reviewing awards on a potentially wide variety of issues. If parties are permitted to agree on judicial review of issues of law, the same principle would logically extend to allow them to provide for other forms of review such as reviewing findings of fact or evidentiary issues (where the rules of evidence apply). Nor would there be anything to prevent parties from stipulating specific standards for judicial review or even for different standards or review for different issues. Justin Edwab, *A Colorado Court of Appeals Declines to Adopt the Common Law Standards of Manifest Disregard of the Law for Vacating Arbitral Awards*, 4 J. Am. Arb. 193, 197 (2005) ("[I]f the

judiciary was able to create its own grounds for judicial review, the effectiveness and legitimacy of arbitration would diminish. . . adoption of this standard would create a slippery slope for additional judicially-created grounds for review.") (internal quotations omitted) (citing *Coors Brewing Co. v. Cabo*, 114 P.3d 60, 65-66 (Colo. App. 2004); Pelagia Ivanova, *Note: Forum Non Conveniens and Personal Jurisdiction: Procedural Limitations on the Enforcement of Foreign Arbitral Awards under the New York Convention*, 83 B.U.L. Rev. 899, 901-02 (2003) ("[T]hough judicial review is certainly necessary and important to international arbitration, limits to judicial discretion are no less crucial to prevent abuse. The argument for such limits is even stronger where a treaty explicitly restricts judicial discretion . . . recent decisions could lead courts down a slippery slope, undermining the pro-enforcement purpose of the New York Convention and pushing international arbitration of business disputes into obscurity.") As one noted commentator has observed, this principle "[c]ould [even] justify [party-driven] judicial review of arbitral awards beyond the limits prescribed for judicial review of court decisions." Hans Smit, *Contractual Modification of the Scope of Judicial Review of Arbitral Awards*, 8 Am. Rev. Int'l Arb. 147, 151 (1997); *see also First Options of Chicago, Inc.*, 514 U.S. at 948 ("For one thing, it is undesirable to make the law more complicated by proliferating review standards without good reasons.").

Even if this Court were to accept party-stipulated review for errors of law only, as the Petitioner proposes, this would still not affirmatively limit the scope of review. The difficulties in distinguishing between questions of law and fact have been well documented. *See* Taner Dedezade, *Are You In? Or Are You Out? An Analysis of Section 69 of the English Arbitration Act 1196 – Appeals on A Question of Law*, Int'l A.L.R. 2006, 9(2), 56-67 at 66 (2006) (noting the "multitude of case law" under the English Arbitration Act 1996, which, as discussed below, provides for judicial review of arbitral legal issues, "in which the courts have had to

consider whether an issue falls into the category of an error of law or simply a finding of fact"). Even in review proceedings ostensibly limited to issues of law, the courts may still end up reviewing both the law and the facts. Unless arbitration awards are rendered impervious to judicial scrutiny, save in the narrow circumstances permitted by the FAA, the arbitration process will end up deciding none of the issues submitted to it and will be little more than an expensive and time-consuming prelude to litigation.

V. LEADING ARBITRATION JURISDICTIONS TEND TO LIMIT JUDICIAL REVIEW OF ARBITRAL AWARDS AND PERMITTING JUDICIAL REVIEW WILL MAKE THE UNITED STATES A LESS ATTRACTIVE FORUM FOR ARBITRATION

A. The International Trend Leans Towards Limiting Judicial Review Of Awards

The international trend is toward limited judicial review. International model arbitration legislation and many of the key centers for international arbitration have, in the last two decades, increasingly moved toward regimes providing for reduced judicial review in international arbitrations.

1. The UNCITRAL Model Law

The UNCITRAL Model Law on International Commercial Arbitration (the "UNCITRAL Model Law") was drafted by the United Nations Commission on International Trade Law in 1985 to serve as a model upon which to base national arbitration laws relating to international commercial arbitration. The UNCITRAL Model Law, which has been adopted or served as the basis for fifty jurisdictions in addition to six U.S. states and Bermuda,[5] evidences the international trend towards

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[5] According to the UNCITRAL web site, http://www.uncitral.org/, the following jurisdictions have adopted the law: Australia, Austria (2005), Azerbaijan, Bahrain, Bangladesh, Belarus, Bulgaria, Cambodia (2006), Canada, Chile, in China: Hong Kong Special Administrative Region, Macau Special Administrative Region; Croatia, Cyprus, Denmark (2005),

restricting judicial review by enunciating a general policy of exceedingly limited judicial intervention in Article 5, which expressly mandates that "[i]n matters governed by this Law, no court shall intervene except where so provided in this Law." United Nations Commission on International Trade Law (UNCITRAL), *Model Law on International Commercial Arbitration*, Art. 5 (1994). The UNCITRAL Model Law explicitly enumerates the limited grounds upon which a party may seek to set aside an arbitral award and the grounds for refusing to recognize or enforce an award, in Articles 34 and 36, respectively, neither of which provides for review of errors of law.[6] The result of the limited judicial review provided for in Articles 34 and 36 and the exclusionary principle of judicial intervention in Article 5 is that the parties are not permitted to expand the judicial review of an arbitral award under the UNCITRAL Model Law. *See* Vikram Raghavan, *Heightened Judicial Review of Arbitral Awards: Perspectives from the UNCITRAL Model Law and the English Arbitration Act of 1996 on some US Developments*, 15 J. of Int'l Arb. 103, 133 (1998) ("heightened judicial review would be clearly impermissible under the UNCITRAL Model Law because of express provisions that rein in the courts").

Egypt, Germany, Greece, Guatemala, Hungary, India, Iran (Islamic Republic of), Ireland, Japan, Jordan, Kenya, Lithuania, Madagascar, Malta, Mexico, New Zealand, Nicaragua (2005), Nigeria, Norway (2004), Oman, Paraguay, Peru, the Philippines, Poland (2005), Republic of Korea, Russian Federation, Singapore, Spain, Sri Lanka, Thailand, Tunisia, Turkey (2001), Ukraine, within the United Kingdom of Great Britain and Northern Ireland: Scotland; in Bermuda, overseas territory of the United Kingdom of Great Britain and Northern Ireland; within the United States of America: California, Connecticut, Illinois, Louisiana, Oregon and Texas; Zambia, and Zimbabwe.

6 The grounds enumerated in the UNCITRAL Model Law mirror those found in the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards.

2. France

France, where the International Court of Arbitration* is headquartered, is by many measures the leading international arbitration forum, in part, because it has established a policy of limited judicial intrusion into arbitration proceedings and awards. French statutory and jurisprudential authorities have indicated a clear intent to maintain a narrow scope of judicial review in order to aid in the enforcement of arbitral awards, meaning that parties' freedom of contract does not include the right to create new grounds that are not provided for within the explicit text of the applicable statutes. *See* Dan C. Hulea, *Contracting to Expand the Scope of Review of Foreign Arbitral Awards: An American Perspective*, 29 Brook. J. Int'l L. 313, 344-45 (2003) (noting that a reviewing court will not consider non-statutory grounds of setting aside arbitral awards that are suggested by the parties because both decrees governing judicial review of arbitral awards contain specific and exclusive grounds).

French decrees of 1980 and 1981 promulgated modern statutory regulations pertaining, respectively, to domestic arbitration (Articles 1442-1491 of the New Code of Civil Procedure) and international arbitration (Articles 1492-1507 of the New Code of Civil Procedure). Nouveau Code de Procedure Civile [N.C.P.C], Livre IV (1981) (Fr.) (translated in Yves Derains and Rosabel E. Goodman-Everard, *France*, Annex I-II, Suppl. 26, February 1998, in *International Handbook on Commercial Arbitration* (Jan Paulsson ed. 1998)). Article 1484 of the New Code of Civil Procedure establishes six grounds available to set aside a domestic award, whereas Article 1502 of the New Code of Civil Procedure enumerates five grounds upon which to set aside an international award. Neither statute permits the parties to derogate from the enumerated grounds or expand the judicial review of an arbitral award to include errors of law. In fact, both statutes are drafted in a manner to render the enumerated list of appealable grounds exhaustive ("[appeal is] only available on the following grounds").

Nouveau Code de Procedure Civile [N.C.P.C], Livre IV (1981) (France) (translated in Yves Derains and Rosabel E. Goodman-Everard, *France*, Annex I-II, Suppl. 26, February 1998, in *International Handbook on Commercial Arbitration* (Jan Paulsson ed. 1998); *see generally* Laurence Franc, *Contractual Modification of Judicial Review of Arbitral Awards: The French Position*, 10 Am. Rev. Int'l Arb. 215, 217 (1999) ("It has been a constant under French law that the grounds enumerated in the statute cannot be extended, nor reduced; they are exclusive.").

The French pro-arbitration policy allows for an exceedingly limited judicial review of arbitral awards, creating a system in which arbitral decisions are afforded extreme deference. The Cour de Cassation has ruled that parties may not contractually expand the means of recourse available under French law. *Société Buzzichelli Holding c. Hennion*, Cour de cassation [Cass. 1e civ.] [Court of Cassation.] Apr. 6, 1994 (Fr.); *see* Laurence Franc, *Contractual Modification of Judicial Review of Arbitral Awards: The French Position*, 10 Am. Rev. Int'l Arb. 215, 220 (1999) (translating the *Buzzichelli* decision as stating "the international and domestic legal framework on arbitration, provides among others the means of recourse against the arbitral award which the parties are not allowed to modify even by a specific agreement"). Thus far, the French court has not analyzed whether an arbitration clause that allows for expanded judicial review for errors of law is permissible based on the parties' freedom of contract. However, given the French policy of limited judicial intervention in arbitral proceedings or awards, it is likely the French court would refuse to extend judicial review beyond the scope of Articles 1484 and 1502 of the New Code of Civil Procedure.

3. Switzerland

Switzerland has also narrowed the scope of judicial review under its arbitration laws. Article 190 of the new Swiss Federal Code on Private International Law (the CPIL) enacted in 1987 adopted fewer grounds for setting

aside an award than did the previous law, and made clear that this list was exhaustive. *See* Pierre Lalive, *The New Swiss Law on International Arbitration*, 4 Arb. Int'l 2, 15 (1988) (noting the shorter list of grounds for setting aside an award, five instead of nine, and that the list is "'exhaustive' and as precise as reasonably possible, in order to increase foreseeability and legal certainty"); Swiss Federal Code on Private International Law (Switz.) *translated in* Robert Briner, *Switzerland*, in *International Handbook on Commercial Arbitration* 33 (J. Paulsson ed. 1998) (listing the five exclusive grounds for setting aside an award). The revised Swiss law also provides for exclusion agreements. Several commentators have noted that "a main purpose of the new legislation was to restrict the possibilities of appeals against arbitral awards and to simplify and accelerate the procedure for setting them aside." Pierre Lalive, *The New Swiss Law on International Arbitration*, 4 Arb. Int'l 2, 15 (1988).

4. The United Kingdom

The only major "arbitration-friendly" jurisdiction in which there is limited judicial review is the United Kingdom, which, under the Arbitration Act 1996, provides for judicial review of questions of law when the contract is governed by English law. Arbitration Act, 1996, c. 23 (Eng.) (produced in V.V. Veeder QC, *England*, Annex I, Supp. 23, in *International Handbook on Commercial Arbitration* 33 (J. Paulsson ed. 1997)). But this limited form of review actually marked a historic shift away from much more sweeping judicial intervention. Until 1996, the right of appeal on substantive points of law had been essentially automatic. John Tackaberry & Arthur Marriott, *Bernstein's Handbook of Arbitration and Dispute Resolution Practice* 374-82 (4th ed. 2003) (discussing how the 1996 revision narrowed judicial review). The ease with which U.K. arbitration awards could previously be appealed compromised the finality of disputes, and as a result, parties began shopping elsewhere for international arbitration forums. Realizing that arbitration parties did not want

their dispute resolution procedures to mirror the long, drawn-out process of litigation, the United Kingdom revised its arbitration laws to provide for a more narrow review of awards. *See* Arbitration Act, 1996, c. 23, § 69 (Eng.) (produced in V.V. Veeder QC, *England*, Annex I, Supp. 23, in *International Handbook on Commercial Arbitration* 33 (J. Paulsson ed. 1997)) (Subsection (1) of Section 69 states "a party to arbitral proceedings may. . . appeal to the court on a question of law arising out of an award made in the proceedings.")

While the default rules still provide for judicial review of errors of law, parties are permitted to forego such review through agreement in advance. *Id.* (Subsection (1) of Section 69 further states that "an agreement to dispense with reasons for the tribunal's award shall be considered an agreement to exclude the court's jurisdiction."); *accord Lesotho Highlands Development Authority v. Impregilo SpA*, [2005] 3 All ER 789, 801-02 (Eng.) (noting in the context of review under Section 68 that "[a] major purpose of the [Act] was to reduce drastically the extent of intervention of courts in the arbitral process"). Furthermore, even when such an agreement is not reached, judicial review of awards is only permitted through the permission of both parties or leave of the court, which is only given under four narrowly defined circumstances. Arbitration Act, 1996, c. 23, § 69 at (3)(a) (determination will substantially affect the rights of one or more of the parties); (3)(b) (the arbitral tribunal was asked to determine the question); (3)(c) (the arbitral award is obviously wrong, or open to serious doubt, because the question is one of public importance); and (3)(d) (it is proper and just for the court to determine the question).

The legislative history behind this change in U.K. law, as interpreted by the English courts, clearly demonstrates an intent to meet the demand of arbitration parties by narrowing judicial review. During the House of Lords' debate on the Arbitration Act, Lord Fraser emphasized this purpose:

> We started from the principle that if parties have chosen arbitration rather than the courts to resolve their dispute, this decision must be respected. We propose therefore to curtail the ability of the court to intervene in the arbitral process except where the assistance of the court is clearly necessary to move the arbitration forward or where there has been a manifest injustice. It is thus a deregulatory measure in that we are freeing up the process from unwarranted reference to the courts or unwanted interference by them. Intervention by the courts slows down the whole process, which inevitably adds to costs.

568 Parl. Deb., H.L. (5th Ser.) (1996) 761-62. During the same debate, Lord Hacking recognized that prior to these reforms, "it was deemed to be an act of professional negligence . . . to include in a contract an English arbitration clause," and voiced his belief that these changes, most prominently the narrowing of judicial review, would cause parties to develop a more favorable regard for the English arbitration system. *Id.* at 769.[7]

The English experience is thus part of a historic shift away from extensive judicial review, a development that

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7 Thus far, the results prove Lord Hacking to be correct. Since the United Kingdom changed its arbitration laws to significantly narrow the scope of judicial review, it has enjoyed a substantial increase in the amount of international arbitration proceedings taking place within its jurisdiction. *See* Robert Rice, *New Light on an Old Myth, The Financial Times (London)*, Dec. 3, 1996, at 16 (quoting Michael Lee, a litigator with Norton Rose, the City solicitors, as stating that "there has been a steady increase in the amount of international arbitration coming into London as people recognise [sic] that our system is not as time-wasting and costly as in the past"). This increase in international arbitration proceedings is due to the U.K.'s efforts to bring its laws in line with the demands of international arbitration parties. As Lord Fraser recognized, "arbitration is highly mobile in an international sense. A number of other countries have been making efforts to make their legislation more accessible to the business user. [The U.K.] must do the same if [it is] to safeguard the future competitiveness of London as a world arbitration centre." 568 Parl. Deb., H.L. (5th Ser.) (1996) 761.

occurred in the United States decades ago.[8] It is limited to questions of English law, while the Petitioner's position here (or the principle it espouses) would embroil U.S. courts in the review of legal issues under any substantive body of law, as well as questions of fact and procedure. The English legal system, unlike the U.S. system generally, provides that the losing party pays the other party's legal fees, a feature that has a profound effect on both the nature and volume of litigation, including the review of arbitral awards. Despite a shared common-law system, the English and U.S. legal cultures have significant differences, reflected in a much different view, over the last eight decades, of the role of courts in arbitration, and as to which party bears the costs of unsuccessful litigation.

B. Allowing For Expanded Judicial Review Will Make The U.S. A Less Attractive Forum For International Arbitration

American businesses conducting international business rely heavily on international commercial arbitration to resolve disputes. U.S. parties are among the largest single users of ICC arbitration services. U.S. cities are also among the top venues in the world for international arbitration. The latter is in part due to the fact that the U.S. legal system is perceived as being supportive of international arbitration. Awards are viewed as relatively easy to enforce, and courts are viewed as having a generally non-interventionist approach to arbitrations that recognizes the importance of finality. However, the relatively positive views of the U.S. arbitration system are in contrast with the negative perceptions held by foreign investors and

[8] As Professor Macneil observes, the Illinois Statute was based on the existing English arbitration law of the time, which provided for sweeping judicial review, unlike the New York Act. *American Arbitration Law* at 37 ("Like the 1917 Illinois statute, the English act contained an extremely important provision allowing arbitrators at any stage to put questions of law to the court, and empowering the court to direct the arbitrators to do so. The New York act, in contrast, had no such provision and left intact the Code of Civil Procedure provisions for merely limited judicial review.") (footnotes omitted).

businesses of the U.S. legal system generally. While due in part to significant differences in national and legal cultures, the U.S. legal system is viewed (unfairly or not) as excessively litigious, expensive, prone to frighteningly high judgments, and generally unpredictable. Thus, the U.S. has become an acceptable jurisdiction for international arbitrations in large measure in spite of foreign perceptions of its legal system.

Although U.S. businesses regularly participate in many international arbitrations abroad, the option of having international arbitrations in the U.S. is important to U.S. companies engaged in international commerce. Accordingly, maintaining the perceptions of the U.S. as a friendly forum for arbitration is important to international businesses in the U.S. If the U.S. legal environment were perceived to be more interventionist—in other words, if litigation became (or could be) an important component of arbitral proceedings—the negative perceptions of the U.S. legal system would affect the parties' perceptions of international arbitrations in the United States. *See* Christopher Drahozal, *Enforcing Vacated International Arbitration Awards: An Economic Approach*, 11 Am. Rev. Int'l Arb. 451, 458 (2000) ("International arbitration proceedings are sufficiently mobile that if a national arbitration law is seen as unfavorable, parties can choose a different situs in future agreements to arbitrate.").

Any step toward increased scrutiny of awards would make the United States a less attractive forum for arbitration. "International merchants often prefer arbitration to litigation, *inter alia*, because arbitration is perceived as a faster, less expensive, more flexible, and more confidential means of dispute resolution." Joseph Lookofsky & Ketilbjorn Hertz, *Transnational Litigation and Commercial Arbitration* 756 (2d ed. 2003). If expanded review provisions should become pervasive, due to the ability of one party to impose them on others, international and U.S. businesses will begin to perceive arbitrations seated in the U.S. as merely a preliminary step to prolonged

and costly litigation in the U.S. courts—and will be less likely to choose the U.S. as a seat for arbitrations. The fact that enhanced judicial review is "optional" will not entirely offset the perception that arbitration has become more litigious in the United States. Foreign companies might also understandably wonder how far that trend will go in the wake of a decision by this Court allowing increased judicial intervention. Companies without large legal departments are likely to conclude that the simpler approach is, whenever possible, to insist on arbitration outside of the United States rather than run the risk that a particular arbitration clause may land them in extensive ancillary court proceedings.

In short, providing for expanded review runs against current international trends. International businesses, including international businesses in the U.S., prize finality and a judicial system that respects the integrity of the arbitral process. *See* Hans Smit, *Contractual Modification of the Scope of Judicial Review of Arbitral Awards*, 8 Am. Rev. Int'l Arb. 147, 147 (1997) ("One of the inestimable advantages of arbitration is that it provides for adjudication of disputes in a single instance. . . . Obtaining a resolution of a dispute under such circumstances in a speedy and efficient manner provides a compelling reason for limiting the scope of judicial review . . ."). Moving against this current trend, and engaging in dangerous tinkering with core arbitration principles, will tend to make the U.S. a less desirable place for international arbitration and inevitably make a reliable and efficient system of international arbitration less accessible and more expensive to international businesses in the U.S.

CONCLUSION

For these reasons, this Court should reject Petitioner's argument that parties to an arbitration agreement should be permitted to expand judicial review of arbitral awards beyond the specific grounds set out in the FAA for setting aside and vacating an arbitral award.

Respectfully submitted,

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